Appendix A

United States District Court
Southern District of California

No. 14829

UNITED STATES OF AMERICA EX REL
JUDGE GORDON THOMPSON, JR.,

vs.

MANUEL GLENN ABASCAL

[Filed, June 24, 1974]

CERTIFICATE OF CONTEMPT

In conformity with Rule 42(a) of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 401 I hereby certify that I saw and heard the conduct set forth below, which conduct took place in the actual presence of the court during pretrial motion hearings of the case entitled *United States of America v. Mary Elizabeth Batchelder, et al.*, 14579, 14580 and 14829 Criminal which commenced on June 4, 1974 and has continued to the date of this order.

I find that the conduct of the defendant Manuel Glenn Abascal hereinafter specified, constituted contempt of this court and was of such an insolent nature as to directly affront the decorum and dignity of this United States Court. I firmly believe that if this court cannot require those who are in its courtroom to obey the court, then this court would lose any control it has over its own court and courtroom. Such behavior will not be tolerated by this court, and under the circumstances, I don't think it should be tolerated by any court.

Accordingly, I adjudge the defendant Manuel Glenn Abascal guilty of the criminal contempt described below. I also state that a reading of this record cannot and does not adequately reflect the true intensity of the hostility and discourtesy that the defendant's behavior generated in this court's presence.

THE COURT: At this time we will take our noon recess. We will be in recess now because I have a conference in another case at one-thirty. We will be in recess until two o'clock, two o'clock this afternoon.

MR. EISENBERG: Your honor, the previous admonition that we've had regarding the government and Sheriff De Puy, may remain in effect?

THE COURT: Yes.

MR. FANNING: No problem, your honor.

THE CLERK: All rise.

THE COURT: Mr. Abascal, would you step forward, please?

DEFENDANT ABASCAL: (No response)

THE COURT: Step forward, please.

DEFENDANT ABASCAL: Not without my counsel, sir.

THE COURT: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail.

Accordingly, it is therefore ordered that pursuant to the authority vested in this court by Rule 42(a) of the Federal Rules of Criminal Procedure, and by Title 18, United States Code, Section 401, the defendant Manuel Glenn Abascal be punished for the contemptuous conduct cited above. I find that the acts and demeanor of the defendant in twice refusing to step forward and his willfully remaining slouched in his seat while being personally addressed to be a direct and deliberate confrontation with this court. The insolent behavior was of such a nature as to make the imposition of a fine a wholly insignificant punishment.

Therefore it is further ordered that the defendant Manuel Glenn Abascal be and he is hereby ordered committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of 90 days.

Dated: June 21st, 1974

GORDON THOMPSON, JR.,

United States District Court

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

MANUEL GLENN ABASCAL,
Defendant-Appellant.

No. 74-2227

January 9, 1975

Appeal from the United States District Court
for the Southern District of California

Before: KOELSCH and WALLACE, Circuit Judges and JAMESON,* District Judge.

JAMESON, District Judge:

Manuel Glenn Abascal appeals from a conviction for criminal contempt in violation of 18 U.S.C. § 401. The district court, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, summarily found appellant guilty of contempt and imposed a ninety day sentence.

The appellant was one of nine persons charged in a six count indictment with various offenses involving the illegal importation and possession of narcotics with the intent to distribute. At the time of the alleged contempt, appellant, who was free on bond, was attending a hearing before the district court on a motion made by one of his co-defendants. Appellant had come to the courthouse with his counsel

*Honorable W.J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

to examine records in the clerk's office in connection with a separate motion on behalf of appellant. While his attorney was in the clerk's office, appellant entered the courtroom. Although he had apparently been asked to attend the hearing by counsel for the co-defendant, appellant was not directly involved in the proceedings nor was his presence in court required.

Court was recessed for fifteen minutes during the morning session. The clerk ordered those present to rise. Appellant remained slouched in his seat. When the court reconvened appellant was not present but subsequently returned. Noting appellant's conduct at the opening session, the judge had his secretary prepare a statement which he intended to read to appellant.[1]

At the noon recess, as the judge stood to leave the bench, the clerk ordered all to rise. At that moment counsel for appellant's co-defendant asked the judge a question which was quickly answered. The clerk again ordered "All rise". Everyone in the courtroom with the exception of the appellant rose. The following colloquy then occurred:

> "The Court: Mr. Abascal, would you step forward, please?
>
> "Defendant Abascal: (No response).
>
> "The Court: Step forward, please.
>
> "Defendant Abascal: Not without my counsel, sir.
>
> "The Court: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail."

That afternoon appellant, with his counsel, appeared before the court. Reviewing the incident of the morning, the

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[1]The statement read:

"Mr. Abascal, it concerns me not whether you have any respect for me personally. However, I do demand respect for this court. I suggest that if you entertain any thoughts of becoming an attorney, you conduct yourself accordingly while in the courtroom. This includes standing during

judge stated that he had asked the appellant to step forward for the purpose of reading him the statement he had prepared. Appellant's counsel was given an opportunity to comment. Following the remarks of his counsel, appellant stated:

"I'd like to address the Court and state that, as an institution, I meant no disrespect to the Court and that I required or requested for my fundamental legal right that my counsel be present before I be brought up in front of the Court".

The court termed appellant's conduct "insolent" and held that it "interfered with the judicial process in that it was a direct affront to the dignity of this court". Relying on Rule 42(a), the 90 day sentence was imposed. Following the hearing, the judge filed a formal Certificate of Contempt as required by Rule 42(a). In the Certificate he held that the appellant's failure "to step forward and his willfully remaining slouched in his seat while being personally addressed" were contemptuous and that he had seen and heard this contemptuous behavior which took place in the actual presence of the court.

Contentions on Appeal

Appellant contends that (1) his refusal to step forward when requested by the court at the noon recess did not interfere with the administration of justice and therefore was not contemptuous; (2) the court should have warned him that his conduct could subject him to criminal penalties; (3) the summary contempt procedure of Rule 42(a) was inappropriate; and (4) there was a likelihood of prejudice on the part of the trial judge rendering him unable to fairly adjudicate the matter of appellant's contempt.

Footnote 1 continues —
the opening and closing of each court session. Your continued failure to do so will result in this court's order that except during the hearings involving yourself, you will absent yourself from the courtroom, along with such other sanctions as this court shall impose on you."

Contempt - 18 USC § 401

18 U.S.C. § 401 empowers Federal courts

". . . to punish by fine or imprisonment, at its discretion such contempt of its authority, and none others, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . ."

The allegedly contemptuous behavior consisted of appellant's "twice refusing to step forward and his willfully remaining slouched in his seat while being personally addressed" by the court. Appellant contends that this behavior did not constitute an actual obstruction to justice and therefore was not contemptuous within the meaning of 18 U.S.C. § 401. *Ex Parte Hudgings*, 249 U.S. 378, 383 (1919). We cannot agree.

It is true that the courts have questioned whether the trial court may require spectators "to perform purely ceremonial or symbolic acts". Where, however, "such an act is accompanied by some disturbance, disorder or interruption, an obstruction may exist." *In re Dellinger*, 461 F.2d 389, 401 (7 Cir. 1972).[2] Here we are concerned with more than merely the observance of the formality of rising at the end of a court session. Appellant defied a clear order directed to him personally by the court. The ability of a trial judge to compel obedience to his orders is fundamental to the proper functioning of our system of justice. Whether a person be directly involved in a judicial proceeding or simply a mere spectator, he is subject to all reasonable orders of the court, even those given at the end of a court session. We conclude that appellant's refusal to step forward combined with his apparent disrespect for the court as manifested by his courtroom demeanor constituted an obstruction to the administration of justice punishable under 18 U.S.C. § 401.

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[2]See also *United States ex rel. Robson v. Malone*, 412 F.2D 843, 850 (7 Cir. 1969).

Necessity Of A Warning

Appellant contends that the court committed reversible error in failing to warn appellant that he would be held in criminal contempt if he refused to step forward. We cannot agree. Under certain circumstances, this court and other courts have determined that a warning is necessary before a court may impose criminal penalities, *Yates v. United States,* 227 F.2d 848, 851 (9 Cir. 1955) and *Daschbach v. United States,* 254 F.2d 687, 692 (9 Cir. 1958), or deprive a person of his constitutional rights, *Illinois v. Allen,* 397 U.S. 337, 350 (1970) (Brennan, J., concurring). Those cases, however, are factually distinguishable.[3] We have not been cited nor have we found a case which, under circumstances like these, would require a court to give a warning before citing a person for criminal contempt. Although we consider that a warning would have been appropriate,[4] we cannot hold that the failure to warn constituted a reversible error.

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[3]In both *Yates* and *Dashbach,* this court held that witnesses, who had been held in civil contempt for refusing to answer questions at the command of the court, could not later be subjected to criminal contempt sanctions unless they had been warned that criminal penalties in addition to the civil contempt measures might be imposed for their failure to answer. In *Illinois v. Allen,* the Court was not concerned with a contempt charge but rather with the removal of a disruptive defendant from the courtroom.

[4]The ABA Standards for Criminal Justice, Function of the Trial Judge Sec. 712 states:

> "No sanction other than censure should be imposed by the trial judge unless
>
> (i) it is clear from the identity of the offender and the character of his acts that disruptive conduct was willfully contemptuous, or
>
> (ii) *the conduct warranting the sanction was preceded by a clear warning that the conduct is impermissible and that specified sanctions may be imposed for its repetitions."* (Emphasis added).

The ABA Advisory Committee on the Judge's Function in its commentary on this standard stated in relevant part:

> "A prior warning is desirable before punishing all but flagrant contempts. A warning may be effective in preventing further disorder and is therefore preferable to sanctions as a first step. It also assures both the court and the public that subsequent misconduct will be willfully contemputous and deserving of punishment."

Applicability Of Rule 42(a)

Rule 42 of the Federal Rules of Criminal Procedure prescribes the procedures to be followed in dealing with criminal contempt. Subdivison (a) provides for summary disposition[5] and subdivision (b) for the disposition upon notice and hearing.[6] Here the district court summarily punished appellant pursuant to 42(a).

42(b) provides the "normal procedure" for adjudicating contempt. *Harris v. United States,* 382 U.S. 162, 165 (1965). Because the Due Process requirements of notice and hearing need not be observed in punishing contempt under 42(a), its application is "narrowly limited". *In re Oliver,* 333 U.S. 257, 275 (1948).[7] In *Harris, supra,* at 164, the Court stated;

> "Rule 42(a) was reserved 'for exceptional circumstances,' *Brown v. United States,* 359 U.S. 41, 54

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[5]Rule 42(a) provides:

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

[6]Rule 42(b) provides in pertinent part:

"A criminal contempt except as provided in subdivision (a) of this rule shall be prosec[illegible] on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and described it as such."

[7]The ABA Standards for Criminal Justice, Function of the Trial Judge, Sec. 7.4 states that "Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment". The Advisory Committee's commentary on this section states in relevant part:

> "Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course."

(dissenting opinion), such as acts threatening the judge or disrupting a hearing or obstructing court proceedings. *Ibid.* We reach that conclusion in light of 'the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power,' *ibid.*, and in light of the wording of the Rule. Summary contempt is for 'misbehavior' *(Ex parte Terry,* 128 U.S. 289, 314) in the 'actual presence of the court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.' *Cooke v. United States,* 267 U.S. 517, 534."

The Court has consistently stressed that the "need for immediate penal vindication of the dignity of the court" is the basis for Rule 42(a). *Cooke, supra* at 536.[8] Even though the "misconduct [occurs] in open court, in the presence of the judge, [and] disturbs the court's business" and "all of the essential elements of the misconduct are under the eye of the court" and "are actually observed by the court", it must appear also that "immediate punishment is essential to prevent 'demoralization of the court's authority' before the public". *In re Oliver, supra* at 275.

While the appellant's refusal to step forward when ordered by the judge may have been contemptuous, it does not appear that it was necessary for the court order immediate incarceration. The Supreme Court has consistently held that "the limits of the power to punish for contempt are '[t]he least possible power adequate to the end proposed' ". *Harris, supra* at 165. Appellant's misbehavior occurred after court had been recessed and while the judge was leaving the

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[8]As stated in *Cooke, supra* at 536 with respect to summary contempt procedures:

> "Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it".

bench. Less drastic alternatives were available. If the judge deemed punishment by imprisonment necessary, the procedure outlined in Rule 42(b) should have been followed.[9]

Appellee contends that this case is controlled by *Comstock v. United States*, 419 F.2d 1128 (9 Cir. 1969) wherein this court upheld a contempt conviction pursuant to Rule 42(a). In our opinion *Comstock* is factually distinguishable. There the defendant refused to rise when the adjournment of the court was announced. "He was admonished to rise. He refused. He was directed by the judge to approach the bench. He refused. When the Marshal took him by the arm and forcibly led him to the bench he went limp and as court addressed him lay prostrate on the floor. At a subsequent court session the judge sentenced him to 15 days for contempt of court." *Id.* at 1134. In *Comstock* the party charged with contempt was the defendant in the proceeding and his disobedience of the court command was followed by an actual disturbance in the courtroom. Here, the appellant was not directly involved in the proceeding and there was no disturbance of the nature involved in *Comstock*.

Punishment

Assuming arguendo, that the appellant's conduct justified summary punishment pursuant to Rule 42(a), in our opinion the sentence imposed was excessive. Courts have discretion in punishing contemptuous conduct; but as the Supreme Court has stated:

> "The 'discretion' to punish vested in the District Courts by § 401 is not an unbridled discretion. Appellate

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[9]The brief hearing following the initial incarceration of the appellant does not render what would otherwise be an improper exercise of the summary contempt powers constitutionally permissible. A reading of the transcript of the hearing indicates that the purpose of the hearing was simply to impose sentence. Appellant's guilt had already been determined.

courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed. This Court has in past cases taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put, both by remanding for reconsideration of contempt sentences in light of factors it deemed important, . . . and by itself modifying such sentences." *Green v. United States*, 356 U.S. 165, 188 (1958).

See U.S. v. United Mine Workers, 330 U.S. 258, 302-306 (1947).

In *Robson v. Malone, supra* the court vacated a sentence imposed on two spectators who failed to rise when ordered to do so by the bailiff at the beginning and end of a court session. A sentence of thirty days had been imposed on one spectator and a sentence of ten days on the other. In vacating the sentences, the court noted that the failure to rise was not accompanied by any other disturbance in the courtroom. Stressing that the "contempt power is to be limited to 'the least possible power adequate to the end proposed'" the court concluded:

> "Our careful evaluation of the record convinces us that due enforcement of the court's requirement that all rise required no more in these particular circumstances than was accomplished by the exclusion of appellants from the court room, and their being held in custody for four hours and two and one-half hours respectively." 412 F.2d at 850-851.

Here, as in *Robson*, no other disturbance accompanied appellant's refusal to step forward. Under these circumstances we conclude that the ninety day sentence was excessive. Appellant has already served two weeks of the

sentence. [10] Due enforcement of the requirement that the trial judge's orders be obeyed has been accomplished by the time that the appellant has already served.

In summary we conclude that (1) appellant's misbehavior was contemptuous and punishable under 18 U.S.C., § 401; but (2) did not constitute "exceptional circumstances" requiring "immediate penal vindication of the dignity of the court" pursuant to Rule 42(a); and (3) the remainder of the sentence of imprisonment should be vacated.

Remanded for vacation of remainder of sentence.

WALLACE, Circuit Judge, Concurring:

I concur with the majority except for the last section of the opinion entitled "Punishment" and the vacation of the remainder of the sentence imposed. The district court should be left free to hold a hearing pursuant to Rule 42(b). If it does so, a new penalty may be imposed. Such a hearing may produce evidence which would be relevant to whether the imposition of a new contempt sentence requires modification. I cannot make that judgment before the Rule 42(b) hearing. Therefore, I would reverse merely on the basis that the district court proceeded upon Rule 42(a) instead of Rule 42(b).

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[10] The district court denied motions for a stay pending appeal and for release on Bail. On July 1, 1974 this court granted appellant's application for release on bail.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 74-2227

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MANUEL GLENN ABASCAL,

Defendant-Appellant.

[February 27, 1975]

ORDER

Before: KOELSCH and WALLACE, Circuit Judges and JAMESON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

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*Honorable W.J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

Appendix D

United States Court of Appeals
for the Ninth Circuit

No. 74-2227
D.C. No. Cr 14829

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS

MANUEL GLENN ABASCAL,
Defendant-Appellant.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of HOWARD MOORE, Jr., ESQ. counsel for the appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before March 26, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

[Filed March 14, 1975]

KOELSCH
U.S. Circuit Judge